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# Constitutional Law - Judicial Review - Legalized Gambling - Louisiana State Racing Commission

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ever, dealt not with the application of the fifth amendment to state proceedings, but rather with the extension of state-granted privileges to protect witnesses who were in imminent danger of prosecution in other jurisdictions.[15] Since the Louisiana privilege admittedly could not be applied in the instant case, the cited cases have no application. The decision in the instant case, therefore, seems to be without precedent in the jurisprudence of this state. Although the court did not expressly state that the privilege afforded by the fifth amendment may be generally applicable to proceedings of the Louisiana courts, the recognition of the federal privilege where the similar privilege afforded by the Louisiana Constitution has been expressly withdrawn seems to present strong support for this conclusion. The result of the instant case is to render ineffective the exception provided in the Louisiana Constitution relating to bribery cases and to permit invocation of the fifth amendment to the United States Constitution whenever a witness stands indicted in a federal court. Although a repetition of the facts of the instant case would be fortuitous, the decision does seem to indicate that our court has taken a far more liberal attitude than has been taken by the courts of the federal and other state systems.

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CONSTITUTIONAL LAW — JUDICIAL REVIEW — LEGALIZED GAMBLING — LOUISIANA STATE RACING COMMISSION

The Louisiana State Racing Commission granted Magnolia Park, Inc., permission to conduct harness racing in Jefferson Parish and licensed it to conduct pari-mutuel wagering as part of the operation of the track. Plaintiffs, property owners in Jefferson Parish, brought suit to force revocation of the license and to obtain temporary and permanent injunctions prohibiting the pari-mutuel wagering. They alleged that the statutes which

15. *People v. Denuyl* dealt with the application of MICH. CONST. art. 2, § 16, and expressly stated that the opinion assumed that "the Fifth Amendment to the Federal Constitution . . . does not apply to prosecution under State Laws." *Mitchell v. Kelley* applied FLA. CONST. § 12 (declaration of rights). *State* ex rel. *Doran v. Doran* applied only LA. CONST. art. I, § 11.

empower the Commission to license wagering[1] are violative of the constitutional mandate that the Legislature shall pass laws to suppress gambling.[2] They further alleged that since the operation of the track is unconstitutional, it constitutes a nuisance per se. The district court dismissed the case as of nonsuit. On appeal, *held,* affirmed. The constitutional provision declaring gambling to be a vice is not self-operative and vests in the Legislature the full discretion as to the manner in which gambling shall be prohibited or permitted. The laws creating the Racing Commission and expressly legalizing pari-mutuel betting are constitutional. Therefore, operation of the track is lawful and is not a nuisance per se.[3] *Gandolfo v. Louisiana State Racing Commission,* 227 La. 45, 78 So.2d 504 (1954).

Article XIX, section 8, of the Louisiana Constitution provides that "gambling is a vice and the Legislature shall pass laws to suppress it." This constitutional mandate has been held not to be self-executing and as merely delegating to the Legislature the exclusive power to pass laws making gambling a crime.[4] Gambling has therefore been held to be a crime only where it has been specifically condemned by the Legislature.[5] The word "suppress," as used in the constitutional provision, has been defined in one case as "equivalent to prohibit, put down, or end by force." In that case the court stated that "the Legislature might not license any sort of gambling."[6] In another case, in dicta, the court stated that "it is not possible under the Constitution and laws of this State to license gambling as a lawful

1. LA. R.S. 4:148, 153, 156, 159 (1950). LA. R.S. 4:148 (1950) provides: "The commission may prescribe rules and regulations under which shall be conducted all horse races upon the results of which there is wagering. The commission shall make rules governing, permitting, and regulating the wagering on horse races under the form of mutuel wagering by patrons, known as the 'pari-mutuel wagering' and the 'book-making form of wagering,' *both of which methods are legal.* Only those persons receiving a license from the commission may conduct these types of wagering, and shall restrict these forms of wagering to a space within the race meeting grounds. All other forms of wagering on the result of horse races are illegal, and all wagering on horse races outside the enclosure where horse races have been licensed by the commission is illegal." (Emphasis added.)

2. LA. CONST. art. XIX, § 8(1).

3. The court also held that the laws were not violative of the constitutional prohibition against lotteries found in LA. CONST. art. XIX, § 8(3). This seems to be correct because factors other than chance determine the winner of a horse race.

4. Shreveport v. Maloney, 107 La. 193, 31 So. 702 (1902).

5. State v. Mustachia, 152 La. 821, 94 So. 408 (1922); State v. Austin, 142 La. 384, 76 So. 809 (1917); State v. Scheffield, 123 La. 271, 48 So. 932 (1909); Talbot v. Truxillo, La. Sup. Ct. Docket No. 27,326, 1925 (unreported).

6. State v. Mustachia, 152 La. 821, 824, 94 So. 408, 409 (1922).

occupation."[7] Horse racing bets have been enforced in two court of appeal cases[8] on the basis of article 2983 of the Civil Code,[9] but the validity of that article was not contested in either case. In the instant case, the Supreme Court stated that it was merely reaffirming "our previous rulings that the provision in . . . the Constitution . . . is not self-operative, that there is delegated to the Legislature, and to the Legislature alone, the power to suppress gambling, and to determine how, when, where, and in what respects gambling shall be prohibited *or permitted.*"[10] (Emphasis added.) In doing so, the court apparently felt that its previous decisions had in effect recognized that the Legislature possessed the power to legalize certain types of gambling if it desired to do so, despite the constitutional provision ordering it to suppress gambling. It is submitted that none of the cases relied upon by the court stand for the proposition that the Legislature may legalize pari-mutuel betting on horse races. It is further submitted that the decision in the instant case does violence to the constitutional mandate that the Legislature shall pass laws to suppress gambling.

Analysis of the decision in the instant case seems to indicate that in delegating to the Legislature the right to determine the meaning and scope of the constitutional mandate, the court rejected its traditional duty of judicial review.[11] The court seemed to feel that since the mandate is not self-executing the Legislature has complete freedom to enact any law on the subject of gambling, whether suppressing or permitting it. However, it would seem that the result of the non-self-executing feature of the mandate should be merely that there is no enforceable law on the subject until the Legislature acts.[12] When the Legislature

7. State v. Barbee, 187 La. 529, 551, 175 So. 50, 57 (1937).

8. Mehle v. McLean, 139 So. 681 (La. App. 1932); Bain v. Grillot, 6 La. App. 825 (1927).

9. LA. CIVIL CODE art. 2983 (1870): "The law grants no action for the payment of what has been won at gaming or by a bet, except for games tending to promote skill in the use of arms, such as the exercise of the gun and foot, horse and chariot racing. . . ."

10. Gandolfo v. Louisiana State Racing Commission, 227 La. 45, 71, 78 So.2d 504, 514 (1954).

11. In Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803), Chief Justice John Marshall spoke of judicial review as being "the very essence of judicial duty."

12. The cases relied on by the court in the instant case (see notes 5, 6, and 7 *supra*) are authority for the limited propositions that only the Legislature may pass laws *suppressing* gambling and that gambling is a crime only when defined as such by the Legislature. While the provision is not self-operative and the court could not mandamus the Legislature to pass laws suppressing gambling, this does not exclude the legislation concerning gambling from judicial scrutiny to determine its validity.

does pass a law on the subject, it then becomes the duty of the court to determine whether that law is in harmony with or repugnant to the constitutional provision.[13] It is suggested that the real issue in the instant case was whether or not the constitutional mandate that the Legislature shall pass laws suppressing gambling carries with it the negative implication that they shall not pass laws permitting it. In their dissenting opinions Justices Hawthorne[14] and Hamiter[15] took the latter position in contending that any law permitting, licensing, or legalizing gambling is unconstitutional as violative of the mandate. However, the majority of the court was unwilling to decide this issue, and delegated to the Legislature the right of determining the effect of the mandate.[16] It is submitted that this abdication to the Legislature of the court's function of determining the meaning and scope of the Constitution is a refusal on the part of the Supreme Court to accept its duty of determining the validity of statutes by comparing them with the applicable provisions of the Constitution.

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## EVIDENCE — PRIVILEGE AGAINST DISCLOSURE OF IDENTITIES OF INFORMERS

Defendant, chief investigator of a committee created by the New Orleans Commission Council to investigate the police department of that city, was asked by a grand jury to disclose the names of certain informers whom he had identified by numbers and fictitious names in a report to it. Defendant refused to reveal the names, claiming that since the information was given to him contingent on full assurance to the informers that their names would not be disclosed, he was privileged to refuse to name them. He relied in part on a policy memorandum of the committee which authorized the withholding of names of informers where to do so would not critically hamper the committee's work. Upon direction by the trial court to identify the informers, he was adjudged guilty of contempt for refusal to do

13. State v. Mustachia, 152 La. 821, 94 So. 408 (1922), held that La. Acts 1920, No. 127, p. 185, defining what betting on horse races was criminal, was not a special law in violation of LA. CONST. art. IV, § 4.

14. Gandolfo v. Louisiana State Racing Commission, 227 La. 45, 80, 78 So.2d 504, 514 (1954).

15. *Id.* at 74, 78 So.2d at 517.

16. *Id.* at 71, 78 So.2d at 515.